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No. 76-528

In the Supreme Court of the United States

OCTOBER TERM, 1976

CONSUMERS POWER COMPANY, *Petitioner*

v.

NELSON AESCHLIMAN, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR HANS A. BETHE, ET AL., MEMBERS OF SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, AND MID-AMERICA LEGAL FOUNDATION AS *AMICI CURIAE*

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Pursuant to this Court's Rule 42, Scientists and Engineers for Secure Energy (*"Scientists and Engineers"*), including Hans A. Bethe, Frederick Seitz, Edward Teller, and Eugene Wigner, and the Mid-America Legal Foundation (*"Mid-America"*) hereby move the Court for leave to file the attached brief as

amici curiae. Consent was refused by counsel for the respondents. *Scientists and Engineers* and *Mid-America* have received the written consent of the petitioner to file the brief as *amici curiae.* The Government does not object. Copies of these letters have been filed with the Clerk.

Scientists and Engineers and *Mid-America* have an interest in the disposition of the case which is before this Court pursuant to the writ of certiorari to the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Aeschliman v. United States Nuclear Regulatory Commission,* 547 F.2d 622 (D.C. Cir. 1976), *cert. granted sub nom. Consumers Power Company v. Aeschliman,* 45 U.S.L.W. 3570 (U.S. Feb. 22, 1977) (No. 76-528), based on the expertise and purposes of these two organizations. The brief urges the Court to reverse and remand the judgment of the court below with instructions to deny the petition for review.

Hans A. Bethe, Frederick Seitz, Edward Teller, and Eugene Wigner are representative members of *Scientists and Engineers,* an unincorporated nationwide organization, formed in the Spring of 1976, of over 100 faculty members and researchers from American colleges and universities, both State and private. Its purpose is to correct the alarming degree of misunderstanding on fundamental scientific and technological issues permeating the national energy debate, especially with respect to the balancing of environmental concerns. In pursuing this objective, *Scientists and Engineers* is committed to offering its views, based on the considerable knowledge and expertise of its members, to the public and to the various governmental agencies with responsibility for the development

of a proper legal framework for the resolution of these issues, including participation in judicial proceedings.

As citizens as well as professionals, members of *Scientists and Engineers* are deeply concerned for the well-being and future hopes of our society. The fact that they are mainly scholars and researchers, not connected with power-producing enterprises, enhances the objectivity of their views. As professional natural scientists and engineers they are keenly aware of the many problems related to the production of needed electric power and the importance of a secure energy base for the continued prosperity of the Country. Also they have become greatly alarmed by the continuous slippage in the planning and introduction of new power plants and feel that it is part of their professional obligation to bring to the attention of the Court certain facts and analyses thereof which could be helpful in the resolution of the case at hand.

Mid-America was organized in late 1975 as an Illinois not-for-profit corporation to engage in non-partisan legal research, study, and analysis for the benefit of the general public as to the effect of evolving concepts of law on our democratic institutions and to provide legal representation and to assist other organizations in providing legal representation on matters of public interest at all levels of the judicial process. *Mid-America* takes a special interest in questions of law of a national scope that have a direct effect on the mid-America region, namely, Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio and Wisconsin.

Scientists and Engineers and *Mid-America* have an interest in this case because the decision below interprets the National Environmental Policy Act of 1969, as amended, in a way which will have far-reaching ef-

fects on the operation of the Nuclear Regulatory Commission and other Federal agencies. It also has a direct adverse effect on the supply and cost of electrical energy to all business and residential customers of Consumers Power Company in the State of Michigan and other citizens in the mid-America region who are served by utilities interconnected for purposes of electric supply and reliability.

By abolishing appropriate limitations and thresholds for environmental consideration, the court of appeals has opened the floodgates of endless, unrestrained, and uncontrollable regulatory filibuster thus pushing the energy crisis paradox, discussed within the brief, to its illogical extreme.

Scientists and Engineers and *Mid-America* have carefully reviewed the petition for writ of certiorari and the related briefs for the Federal Respondents and Nelson Aeschliman, *et al.* *Scientists and Engineers* and *Mid-America* respectfully submit that their brief, lodged herewith, presents at least one relevant and significant question of law and a thorough analysis of the related legislative history which was not presented by the parties on consideration of the petition for writ of certiorari. They therefore believe that this question would not otherwise be presented, or at least adequately presented with related legislative history, to the Court, although it would be dispositive of the so-called "energy conservation" issue. It is the view of *Scientists and Engineers* and *Mid-America* that Section 271 of the Atomic Energy Act of 1954, as amended, barred the Atomic Energy Commission and bars its successor licensing agency, the Nuclear Regu-

latory Commission, from considering the need for power issue and energy conservation as an alternative pursuant to the National Environmental Policy Act. 42 U.S.C. § 2018 (1970); 42 U.S.C. §§ 4333 and 4334 (1970); *see Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976).

Further, *Scientists and Engineers* and *Mid-America* consider that their views on the adequacy of the letter from the Advisory Committee on Reactor Safeguards will be of value to the Court in its consideration of that issue. *Scientists and Engineers* and *Mid-America* present no separate statement with respect to the "fuel cycle" issues but concur in the views of the *amici curiae,* Edison Electric Institute, *et al.,* as presented in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., et al.,* U.S. Docket No. 76-419.

For these reasons, *Scientists and Engineers* and *Mid-America* respectfully urge the Court to grant this motion for leave to file their attached brief as *amici curiae.*

Respectfully submitted,

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AS *AMICI CURIAE*

INTEREST OF AMICI CURIAE

The interest of the *amici curiae* is stated briefly in their motion for leave to file this brief, which is bound together with the brief. The *amici curiae* consider it appropriate to expand on that statement here.

The present case, involving inordinate delays and uncertainties in nuclear power licensing, is not singular and should not be considered in isolation. Other nuclear power plant projects have, for a variety of reasons, been delayed or have encountered obstacles; the overall nuclear power building program is, there-

fore, far behind schedule. In addition, the case can be viewed from the overall problem of energy production: The planning and construction of power plants of any kind—including pollution-free hydroelectric projects —have in a large number of cases been subjected to inordinate delays and have in many instances been brought to a standstill or abandoned. The *amici,* of course, fully realize that in the design and construction of new power-generating plants, particularly when they incorporate advances in technology, we may encounter novel problems requiring extensive consideration: Unexpected difficulties must be identified and omissions remedied. Also, arguments can be advanced that because of the potentially far-reaching consequences of present-day acts, decisionmaking on the technological level cannot be left to the producers alone. But when delays in approval and licensing of a reasonably justifiable project begin to be measured by years instead of months, without an end in sight and without any concomitant social benefit, then the *amici* feel that the time is ripe to take a hard look at our practices and procedures.

It is indeed paradoxical that precisely when the Nation is becoming painfully aware of the gradual depletion, or political vulnerability, of some of the traditional sources of energy and discovers the need for the development of new and alternative resources, we are also witnessing the spread and proliferation of practices and procedures which are actually pushing the solution of the energy problem farther and farther into the future thus aggravating an already perilous situation. At stake is the fundamental well-being of our society, our capacity to feed our citizens and the citizens of the world, the security of the country and

many other less extensive but not less important tasks. Yet we appear to be developing a network of mutually contradictory requirements which, while individually plausible, when imposed simultaneously make the development of new power resources a virtual impossibility.

Some among us are asking that nuclear power plants be located in unpopulated areas but others simultaneously object to the erection of electrical high voltage power lines for the transport of energy to the places of need and use. Some among us wish to banish nuclear power generation to remote areas of the land but others want the remote wilderness unperturbed and do their utmost to prevent even the building of access roads needed for the transport of building material and technical equipment. Some are willing to use the power but do not like to transport or store the fuel. Some States levy fines for the damage to aquatic life by the cooling systems of power plants, but cities of the same States object to the construction of tall cooling towers—an alternative to thermal heating of waterways. These and many other kinds of mutually exclusionary requirements seemed bearable as long as they appeared sporadic. However, the court of appeals' decision now before this Court throws open Pandora's Box. The "conservation of power" issue is as debatable and susceptible to endless challenges and counterchallenges as any issue can be.

It is on the basis of an appreciation of these circumstances that the *amici* have developed an interest in the matter before the Court.

SUMMARY OF ARGUMENT

The initial question before the Court is whether the Atomic Energy Act requires a finding of the need for power and therefore, implicitly, consideration of alternatives to that need including conservation. Or if such a finding was not required by that Act, whether that Act permits consideration of that question pursuant to another statute, namely, the National Environmental Policy Act of 1969. We respectfully suggest to the Court that the need for power and its alternatives may not be considered by the Commission, since the Atomic Energy Act does not require such a finding by the Commission and expressly bars the Commission from considering the issue pursuant to the National Environmental Act. Further, even if Section 271 of the Atomic Energy Act did not absolutely bar consideration of the need for power and energy conservation, the questions raised by the intervenors are barred as too "remote and speculative" since they would require changes in the policies, regulations, or statutes of the Commission and other Federal and State agencies.

However, the Commission did indeed consider conservation. Thus, if the Court should find that the Commission had such a duty, we argue that the Commission's consideration was adequate under the circumstances of this case.

The *amici* also argue that the letter from the Advisory Committee on Reactor Safeguards complied with the Committee's statutory responsibilities on the basis of the history of that Committee under the constant supervision of the Joint Committee on Atomic Energy. The *amici* present no argument with respect to the fuel cycle issue, but adopt the position of the *amici* Edison Electric Institute, *et al.*, presented in *Vermont*

Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., et al., U.S. Docket No. 76-419.

I. THE COMMISSION MAY NOT CONSIDER, AT LEAST INDEPENDENTLY, THE NEED FOR POWER FROM THE MIDLAND NUCLEAR POWER PLANT OR ENERGY CONSERVATION AS A POSSIBLE ALTERNATIVE.

A. The Commission has No Responsibility under the Atomic Energy Act Itself to Consider the Need for Power.

In considering applications for licenses for nuclear power plants, the Atomic Energy Commission ("the Commission") was required, and its successor licensing agency, the Nuclear Regulatory Commission (also "the Commission") is required, to make certain determinations under Section 103 of the Atomic Energy Act of 1954, as amended [hereinafter cited as the Act], in accordance with the purposes and provisions of the Act. 42 U.S.C. §§ 2133, 2011-13 (1970).

The only arguably relevant requirement under Section 103 of the Act is that the Commission make a finding that the proposed activities under the license "will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized." 42 U.S.C. § 2133(b)(1) (1970). This "useful purpose" test does not address the need for power issue, but was intended only to authorize the Commission to select among applicants for Section 103 licenses, including power plant licenses, in the event of a shortage of material.[1] The "useful purpose" cri-

[1] This language "provides . . . a sufficient safeguard against using special nuclear material in unproductive ventures at a time when the supply of such material is limited." *S. 3323 and H.R. 8862, to Amend the Atomic Energy Act of 1946: Hearings before the Joint Comm. on Atomic Energy,* 83d Cong., 2d Sess. 415 (1954)

terion does not authorize an inquiry by the Commission beyond health and safety, and national defense and security when there is an adequate supply of material.

> These criteria . . . afford assurance that any qualified applicant seeking to use such a reactor could obtain a license to engage in that use, subject, of course, to the availability of special nuclear material and to appropriate safety and security safeguards.[3]

B. The Commission's Responsibility Under NEPA May Be Limited by Pre-Existing Statute.

The National Environmental Policy Act of 1969, as amended, [hereinafter cited as NEPA], 42 U.S.C. §§ 4321-47 (1970 & Supp. V 1975) requires that every Federal agency, "to the fullest extent possible", prepare a detailed statement on, among other things, "alternatives to the proposed action". 42 U.S.C. § 4332 (2)(C)(iii) (1970). In preparing that statement, the

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[hereinafter cited as *Hearings on 1954 Amendments*] (supplementary statement of Special Comm. on Atomic Energy of the Ass'n of the Bar of the City of New York), *reprinted in* AEC, II LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT OF 1954 (PUB. L. 703, 83RD CONG.), at 2045 (1955) [hereinafter cited as LEGISLATIVE HISTORY]. Chairman Cole of the Joint Committee interpreted it as limiting the Commission's power to select among applicants on the basis of the usefulness of proposed activities to those instances in which there was "not enough fissionable material to go around." *Hearings on 1954 Amendment*, at 645, *reprinted in* II LEGISLATIVE HISTORY, at 2283. This circumstance does not exist now, nor was it suggested in the hearings in this matter before the Commission.

[3] *Hearings on 1954 Amendments, supra* note 1, at 600 (statement of Comm'r Joseph Campbell), *reprinted in* II LEGISLATIVE HISTORY, *supra* note 1, at 2238.

Commission is required to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise" and to make available to the President, the Council on Environmental Quality and "the public" the "comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards." 42 U.S.C. § 4332(2)(C) (1970).

In preparing the environmental impact statement for the Midland Nuclear Power Plant, the Commission obtained comments on the "need" for the Midland Nuclear Power Plant from the Federal Power Commission and various State and local agencies of the State of Michigan and, in addition, comments from non-governmental persons, such as Saginaw Valley and Mapleton Intervenors. AEC, FINAL ENVIRONMENTAL STATEMENT RELATED TO THE CONSTRUCTION OF MIDLAND PLANT UNITS 1 AND 2, Consumers Power Company, Docket Nos. 50-329 and 50-330 (March 1972), at Appendix E, 15-21, 57-183 [hereinafter cited as *Midland FES*]. The Federal and State authorities uniformly supported the need for the plant. *Id.* at Appendix E, 15-21, 57. All of the comments, both governmental and non-governmental, were included in the *Midland FES, supra.*

However, NEPA recognizes that Federal agencies may be limited by their statutory authority in such a manner as to "prohibit full compliance with the purposes and provisions" of NEPA. 42 U.S.C. § 4333 (1970). Further, NEPA recognizes that Federal agencies may have "specific statutory obligations" that require them "to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency." 42 U.S.C. § 4334

(1970). This Court has also recognized that such statutory limitations and requirements even may bar an agency from preparing any environmental impact statement at all. *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787-88 (1976); *United States v. SCRAP*, 412 U.S. 669, 694 (1973) (*SCRAP I*).

The legislative history of NEPA, as quoted by this Court in *Flint Ridge Development Co.*, recognizes that the agency's duty to prepare an environmental impact statement is negated to the extent that "the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." 426 U.S. at 787.

The court below also has held in a comparable context that "NEPA does not mandate action which goes beyond the agency's organic jurisdiction." *Gage v. AEC*, 479 F.2d 1214, 1220 n. 19 (D.C. Cir. 1973), *citing Kitchen v. FCC*, 464 F.2d 801, 803 (D.C. Cir. 1972). Those prior holdings are in stark contrast to the decision below in this case.

C. Section 271 of the Act Bars the Commission from Considering, at least Independently, the Correctness of the Federal and State Policies on Supplying Electric Power.

We suggest that Section 271 of the Act bars the Commission from any consideration of the need for power or conservation of power issues. 42 U.S.C. § 2018 (1970). Section 271 of the Act states in relevant part:

> Nothing in this [Act] shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power pro-

> duced through the use of nuclear facilities licensed by the Commission . . . .

If the Commission were to consider the issue of need for, or conservation of, power in the manner it would be taking action which would "affect" the exercise of economic and other regulation of electricity by those other Federal and State agencies[3] in contravention of Section 271. It is barred from doing so.

Although the words of Section 271 are clear, as this Court has noted:

> "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" [citations omitted]

Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976), quoting *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44 (1940) (footnotes omitted).

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[3] In some States a certificate of public convenience and necessity is required from the Public Utility Commission before a utility may begin construction of a new electric facility. In other States, such as Michigan, the Public Utility Commission passes on the appropriateness of the need for the facility in considering whether its construction expenses should be included in the rate base for the utility. And in still other States, the legislature has delegated to a public body other than the Public Utility Commission the power to make the decision for new generating plants or retained that authority in itself. *See* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, 1975 ANNUAL REPORT ON UTILITY AND CARRIER REGULATION, Section L, at 508 (1976); *see, e.g.*, N.Y. Public Authorities Law, § 1005 and N.Y. Public Service Law, § 146(2)(f) (McKinney's Consol. Laws of N.Y. 1970) for authorization of new generating facilities by the State legislature with the determination to be made by the utility entity.

In this instance, the legislative history reinforces the plain wording of this statute. The Senate Report on the 1954 Act states: "Section 271 . . . preserves the regulatory power of any appropriate agency with respect to the generation, sale, or transmission of electric power."[4] The separate views of Representatives Holifield and Price reinforce that interpretation by regretting that the legislation would do no more than provide "bare assurance that the electricity generated from the resource shall be subject to the ordinary processes of utility regulation." *Id.* at 120, *reprinted in* I LEGISLATIVE HISTORY, *supra* note 1, at 868. They urged that, contrary to Section 271, the Commission should have the power to assure that nuclear power would be "conserved and developed for the best possible use." *Id.* Their view of the effect of Section 271 was correct; their opposition to it failed. The authority to decide whether new generation is needed and whether, and to what extent, the suggested conservation measures are an appropriate substitute, is reserved to the other Federal, State, and local agencies. The Commission is excluded not only from exercising such authority but from "affecting" the exercise of that authority, even where the authority exists only potentially. *See* note 4, *supra.*

An exchange between Mr. Walker L. Cisler, President of the Detroit Edison Company, Detroit, Michigan, and Representative Chet Holifield during the

[4] S. REP. No. 1699, 83d Cong., 2d Sess. 31 (1954), *reprinted in* I LEGISLATIVE HISTORY, *supra* note 1, at 749. Note that Congress was aware that at that time there were six States which did not regulate utilities at all and nonetheless deprived the Commission of any consideration of the need for power, rates, etc.

1954 hearings before the Joint Committee on Atomic Energy ("Joint Committee") illustrates this dichotomy of responsibility between the Atomic Energy Commission and the State public utility commissions:

> Representative HOLIFIELD . . . . But does the number of licenses still require that a complete system be licensed with one general license, or would you anticipate, if you built 10 reactors, for instance, in a grid, receiving licenses for each of the 10?
>
> Mr. CISLER. Each of the 10.
>
> Representative HOLIFIELD. And each to be considered on its merits?
>
> Mr. CISLER. Yes. That is the way we carry out our development, project by project, when we go before the Michigan Public Service Commission. We go before them with a particular project and a financial requirement.
>
> Representative HOLIFIELD. But in regard to getting licenses in these reactors, you would have to come to the AEC for those?
>
> Mr. CISLER. Yes.
>
> Representative HOLIFIELD. And you might have to observe different regulations.
>
> Mr. CISLER. Yes. Certainly whatever would be the regulations to cover national security, health, and safety.

Hearings on 1954 Amendment, supra note 1, at 86, *reprinted in* II LEGISLATIVE HISTORY, *supra* note 1, at 1720. This exchange demonstrates, particularly in the context of utility reguiation in Michigan, that the decision on the health and safety and the common defense and security aspects of authorizing a nuclear power plant are the domain of the Commission; the decision as to the need for the additional electric generation is left to the utility and the State public

service authorities to the same extent that it would be if non-nuclear fuel were utilized.

That conclusion is supported by the response of Representative Cole, Chairman of the Joint Committee, to a question during debate on the floor of the House:

> Mr. YATES. Does not the gentleman agree that under the language of later provisions of this bill the duty is imposed upon the Commission to determine whether the public convenience and necessity require certain commercial institutions to be licensed to construct reactors for the production of power for civilian purposes?
>
> Mr. COLE of New York. I do not think there is any imposition upon the Commission of a duty to grant licenses based upon public convenience and necessity. That is regulated by existing Federal and State authorities. We do not touch that in any respect.

100 CONG. REC. 11,054 (daily ed. July 23, 1954), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 2906.

The addition of Section 272 of the Act also supports this interpretation. 42 U.S.C. § 2019 (1970). The purpose of Section 272 was to assure that the Federal Power Commission would have jurisdiction over the interstate commerce aspects of nuclear power plants, although there possibly would be *no* agency with intrastate jurisdiction. 100 CONG. REC. 11,567-73 (daily ed. July 26, 1954), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 3760-66; 100 CONG REC. 11,707-13 (daily ed. July 27, 1954), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 3832-38. Also, the debate on Section 272 contains exchanges concerning the effect of Section 271. For example, Senator Hickenlooper, Vice-Chairman of the Joint Committee, said that Section 271 was intended "as a positive negation of any intent by this statute to interfere with the existing laws and the existing authorities, State and Federal, that have to do with electricity." 100 CONG REC. 11,709 (daily ed. July 27, 1954), *reprinted in* III LEGISLATIVE HISTORY, *supra* note 1, at 3834.

Not only did the court below fail to deal with the clear language of limitation in Section 271, but the authorities cited by that court in support of its concept of the Commission's obligation to consider the energy conservation alternative are of doubtful persuasiveness. Pet. App. 103 n. 16, *citing Environmental Defense Fund, Inc. v. Corps of Engineers (Tennessee-Tombigbee)*, 492 F.2d 1123 (5th Cir. 1974), and *Carolina Environmental Study Group v. United States*, 510 F.2d 796, 800 (D.C. Cir. 1975).[5]

Further, the reliance of the court below on the Commission's *Niagara Mohawk* decision, *supra* note 5, as a recognition of some duty to consider conservation also fails. In *Niagara Mohawk* the Commission exceeded the limit of its authority, set out by Section 271, in de-

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[5] The *Corps of Engineers'* decision is inappropriate since there is no suggestion in the decision of any statutory limitation on the Corps' authority to consider the need for that project, and it is not clear whether the court had the power to review: "Hence, even severely circumscribed judicial review is both inapposite and *unnecessary*." 492 F.2d at 1141 (emphasis added).

The court of appeals' reliance on *Carolina Environmental Study Group* to support its directive to the Commission is also misplaced for several reasons including the fact that the decision deals with review of the Commission's analysis in the context of the need for power and alternative sources of energy subsequent to Niagara Mohawk Power Corporation (Nine Mile Point, Unit No. 2), 6 AEC

termining that certain energy conservation issues should be considered in nuclear power plant licensing proceedings. The Commission's enthusiasm to show sensitivity to such environmental concerns does not vest it with the power to do so.

> The power of a administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity [citing citations].

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936); *cited in Dixon v. United States,* 381 U.S. 68, 73 (1965); and *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 214 (1976). Although the determination of the Commission can be helpful on occasion in the interpretation of the Act, "the ultimate responsibility" for the construction

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995 (1973) [hereinafter cited as *Niagara Mohawk*]. Also insofar as that Commission opinion would be interpreted to support requiring the Commission to evaluate independently the need for power, we suggest it is in error due to Section 271.

While other agencies have been required by the lower courts to consider the energy conservation alternative in the NEPA review of their proposed actions, those agencies do not appear to be precluded from such consideration by a statutory restraint similar to the restraint of Section 271 on the Commission. *E.g.,* North Carolina v. Federal Power Commission, 533 F.2d 702, 706-07 (D.C. Cir.) (review of EIS prepared by FPC for proposed hydroelectric project), *vacated and remanded on other grounds,* 97 S.Ct. 250 (1976); Sierra Club v. Morton, 510 F.2d 813, 825 n. 32 (5th Cir. 1975) (review of EIS prepared by Department of Interior for proposed sale of oil and gas leases in the Outer-Continental Shelf).

of the Act rests with the courts. *FTC v. Texaco, Inc.,* 393 U.S. 223, 226 (1968).

Both the language of Section 271 and the weight of legislative history explaining the purpose of this language of limitation support an interpretation of the Act to exclude from Commission review the energy conservation alternative as suggested by respondents. Any Commission determination inconsistent with this view, therefore, would be a "mere nullity."

If this Court should find that the Commission may not make an independent determination of the need for power but should determine only that the agencies with that responsibility have not made a contrary determination on the need for power, the record here is adequate. The Commission did consult with the relevant Federal and State agencies and received comments from those agencies uniformly supporting the need for power from the proposed Midland units. At least when the Commission had made this inquiry and received such advice its consideration of the matter should have been at an end. The fact that Commission's policy allowed for further consideration of the matter should be considered irrelevant since the Commission had no power to do so.

D. This Allocation of Responsibility Properly Recognizes the Distinct Expertise and Authority of Federal and State Agencies and is Necessary to an Orderly Scheme of Regulation.

The Atomic Energy Commission was constituted under the 1954 Act to oversee "a program for Government control of the possession, use, and production of atomic energy . . . so directed as to make the maximum contribution to the common defense and security and

the national welfare." 42 U.S.C. § 2013(c) (1970). To fulfill this responsibility, the Commission developed expertise in the health and safety aspects of the private use of atomic energy.

On the other hand, State authorities have traditionally exercised control over the intrastate provision of electric energy including economic incentives and disincentives to electric consumption. On the Federal level, the Federal Power Act gave to the Federal Power Commission authority to regulate "the business of transmitting and selling electric energy for ultimate distribution to the public [to the extent that] the transmission of [such] electric energy [is] in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest." 16 U.S.C. § 824(a) (1970). That Federal authority is limited to "those matters which are not subject to regulation by the States." *Id.*

If we are to have any order in the development of policy and regulation over electrical generation, transmission and distribution, this scheme of separate expertise and responsibility must be respected. It was for precisely these reasons that Congress enacted Section 271 of the Atomic Energy Act. And it was with such a statutory limitation in mind that Congress in enacting NEPA provided in 42 U.S.C. §§ 4333 and 4334 that NEPA should not be read to eliminate existing statutory responsibilities or limitations or responsibilities.

E. The Courts also have Recognized that the Agencies Need Not Consider Alternatives which Involve Changes in Regulatory or Statutory Policy of Other Agencies.

Distinct from the statutory limitation on the ability of an agency to fulfill the mandate of NEPA discussed

above, the courts have recognized that an alternative which requires a change in the policy, regulations or statutory authority of another Federal or State agency is a remote or speculative alternative and, therefore, need not be considered to fulfill the purposes of NEPA. In *Natural Resources Defense Council, Inc.* v. *Morton,* 458 F.2d 827, 837-38 (D.C. Cir. 1972), the court said:

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies—making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.

The matters raised by the intervenors were certainly matters requiring changes in the statutes, regulations and/or policies of other agencies, the effect of which could in no way be predicted at the time of the licensing hearing in question and certainly not on the superficial basis presented by the intervenors. The court of appeals quotes a non-regulatory agency statement (issued more than four years after the hearing in question and a year and a half after oral argument in this case) to the effect that electric power demand will probably grow at less than 7% per annum, but is unlikely to grow at less than 5 to 5.5% per annum. This is of little relevance to the factual context in which the Commission considered this case, has no bearing on the specific service area involved, and does not even contradict the basis used by either the appli-

cant in proposing the plant, the Federal Power Commission in recognizing the need for the plant or the Commission in approving it. *See* Pet. App. 102, n. 15; the Final Environmental Statement cites a 6.3% electric power growth for the region. *Midland FES, supra* at X-1.

II. IF THE COMMISSION IS NOT BARRED FROM AN INDEPENDENT ASSESSMENT OF THE NEED FOR THE PLANT, THE COMMISSION'S RULES FOR LIMITING THE EXTENT OF THAT INQUIRY WERE APPROPRIATE.

It is difficult to understand the basis for the lower court's decision on the energy conservation issue. The opinion below seems to focus on the Commission's failure to discuss energy conservation in the *Midland FES* as a ground for reversal. *See, e.g.,* Pet. App. 93.

The fact that the intervenors' contentions were not explicitly discussed within the "alternatives" or "need for power" sections of the *Midland FES, supra* at XI and X, is not determinative. Those comments were included as part of the appendix to that statement. The discussion and consideration of the alternative of energy conservation by the Licensing Board, the Appeal Board, and the Commission itself clearly show that conservation was considered by the Commission. This Court has established that the reviewing court should look to the record of the proceedings as a whole and should not confine attention to the single document, styled as the Final Environmental Statement, to determine the adequacy of the NEPA consideration by the agency. *Aberdeen & Rockfish R.R. v. S.C.R.A.P.,* 422 U.S. 289 (1975) *(SCRAP II).*

The Commission did not ignore energy conservation here. The Commission simply decided that the intervenors should be required to give some indication or make some affirmative showing as to the purpose and effect of more detailed discussion of conservation before granting the intervenors a further hearing on energy conservation. The Commission, contrary to what the court of appeals said, did not impose on the intervenors "the burden of an affirmative evidentiary showing" but only "some affirmative showing" which would be "susceptible to a reasonable degree of proof." *Compare* Pet. App. 101, n. 1 *with* Pet. App. 97. The Commission explicitly disavowed the establishment of a burden equivalent to that of "the civil litigation concept of a *prima facie* case, an unduly heavy burden in this setting. But the showing should be sufficient to require reasonable minds to inquire further." Pet. App. 344 n. 27.

In establishing this test, the Commission was only requiring that the intervenors present a reasonable position for detailed consideration in the hearing process to avoid undue delay in the consideration of the application. If the Commission is to be forced to explore in a hearing the possible implications of each and every general statement raised by intervenors without requiring specificity, the already burdensome delays in the licensing process may become an insuperable obstacle. Mere assertions that a difference in advertising or promotion efforts (*e.g.,* Contention 75, Pet. App. 1379), resort to purchase of electricity from other utilities (*e.g.,* Contention 74, Pet. App. 1379), revision of load forecasts (*e.g.,* Contention 73, Pet. App. 1378-79), or the development of a "national or state-wide conservation movement" (*e.g.,* Contention 81, Pet. App. 1382) may reduce or even eliminate the need for the plant, provide no factual basis for requiring the Commission to consider these questions

further, in the face of detailed calculations provided by the applicant and supported by governmental agencies with responsibility for such matters.

Contrary to the characterization by the court of appeals, the record on the Consumers Power applications before the Commission indicates that the issue of energy conservation was admitted as part of the hearing and that the intervenors were invited to present evidence on that issue. Pet. App. 324 *passim*.[6] The intervenors presented no such evidence. The failure of the intervenors to present evidence was the basis for the Commission's decision not to allow them a further opportunity to delay the project by reopening the hearing. *See, e.g.,* Pet. App. 344.

The court of appeals also erred in finding that the Commission's decision declined to allow evidence of energy conservation measures to reduce or eliminate the need for the Plant on the basis of an exercise of its discretion not to apply the *Niagara Mohawk* decision retroactively. *See* Pet. App. 97, n. 9. In its decision Pet. App. 324, 336-37, the Commission decided not to reopen a contention "obliquely raised" because, although the Licensing Board had admitted that contention, the intervenors had presented "[n]o evidence . . . and the board did not further consider this contention,

[6] Contentions relating to promotional activities were allowed. Pet. App. 334. Contentions relating to rate structure, although only "obliquely" raising energy conservation issues, and contentions relating to projected demand, although not properly energy conservation issues, were nevertheless allowed since they raised issues of "need for power". Pet. App. 335 and 339. Other contentions were ultimately excluded, not because energy conservation was excluded but because they were not properly issues of energy conservation. Pet. App. 336, 337 and 340.

consistent with our views (discussed hereafter) on burden of proof in this area." The Commission's statement that it would not apply the *Niagara Mohawk* decision retroactively was then included as *dicta* to the adjudicatory action which announced policy to give guidance to potential litigants before the agency and not as part of its rationale for its disposition of the case at hand. *Cf. NLRB v. Bell Aerospace Co. Div. of Textron, Inc.,* 416 U.S. 267, 290-94 (1974).

As the court of appeals said in *Carolina Environmental Study Group,* 510 F.2d at 801,

> The requirement is not to explore every extreme possibility which might be conjectured. Rather, we view NEPA's requirement as one of considering alternatives as they exist and are likely to exist.

If such a reasonable limitation is not placed on the obligation of an agency to consider alternatives "there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *ICC* v. *Jersey City,* 322 U.S. 503, 514 (1944).

III. THE REPORT OF THE ADVISORY COMMITTEE ON REACTOR SAFEGUARDS WAS IN COMPLIANCE WITH ITS STATUTORY RESPONSIBILITY.

When it began its operations in 1947, the AEC established a Reactor Safeguards Committee as an advisory committee of recognized technical experts to provide it with an independent evaluation of the hazard aspects of existing and proposed reactors. JOINT COMMITTEE PRINT, A STUDY OF AEC PROCEDURES AND ORGANIZATION IN THE LICENSING OF REACTOR FACILITIES, 85th Cong., 1st Sess. 27 and 111 (1957) [hereinafter

cited as *JCP*]. In 1950 the Commission appointed an Advisory Committee on Reactor Locations Problems as an advisory committee of consultants with scientific and engineering backgrounds to study sites of government reactors and to evaluate environmental aspects of reactor hazards. *Id.*

In 1953, after it became evident that problems of reactor location and reactor safeguards could not be considered separately, the two committees were consolidated into the pre-statutory Advisory Committee on Reactor Safeguards ("ACRS") as a group of part-time consultants furnishing advice to the Commission on proposed or existing reactor facilities, and on the adequacy of proposed reactor standards. *Id.* While only the Commission conducted activity in reactor development and construction, the number of cases was sufficiently small so that the ACRS could be expected to furnish advice on each one. *Id.* at 111. But with the passage of the 1954 Act and the opening of the field to private companies, the Commission found it necessary to establish a full-time hazards evaluation staff, and then a Division with the responsibility to examine in detail the hazard aspects of every reactor.[7] *Id.*, at 28 and 111. During this period, the advice of the ACRS was only sought in cases of large reactors, reactors having unusual problems, or at the Commission's request. *Id.* The AEC intended to change the function of the ACRS over a period of time so that except in special cases it would be concerned with generic issues rather than application-specific issues. *Id.* at 28. Reports by the ACRS were not made public as

[7] *See also* BERMAN and HYDEMAN, THE ATOMIC ENERGY COMMISSION AND REGULATING NUCLEAR FACILITIES 81-84 (1961).

the Commission considered them intra-agency advisory recommendations subject to executive privilege, the release of which would be injurious to the functions of the agency. *Id.* at 33; *Berman and Hydeman, supra* note 7, at 82.

In mid-1956, the Commission issued a provisional license to the Power Reactor Development Corporation despite questions raised in an ACRS report as to the safety of the proposed reactor. The Commission initially refused the request of the chairman of the Joint Committee to make the report public. However, after excerpts were leaked to the public, the Commission did release the report to the Joint Committee along with various staff reports by the hazard evaluation staff but indicated that such release would not be its future practice. *JCP* at 30.

Thereupon the Joint Committee began the study from which the facts above are taken considering, *inter alia,* whether the ACRS should be made a statutory body with its reports made public. *Id.* at 32.

Notwithstanding the Commission's position, the 1957 amendments to the Atomic Energy Act of 1954 were enacted adding Section 29 and a new Section 182b making the ACRS a statutory body composed of part-time members to review and report on certain reactor license applications and requiring the public release of those reports. (Pub. L. No. 85-256, 71 Stat. 576).

The report on the bill, S. REP. No. 296, 85th Cong., 1st Sess. *reprinted in* [1957] *U.S. Code Cong. & Ad. News,* 1803, 1813, establishes that the ACRS was to be an *advisory* committee. *Id.* at 1813.

Over the years, the Joint Committee continued to be aware of the manner in which the ACRS operated to advise the Commission in the process of the Commission's decisionmaking. *E.g., Licensing and Regulation of Nuclear Reactors: Hearings Before the Joint Committee on Atomic Energy,* 90th Cong., 1st Sess. 84 (1967); *AEC Licensing Procedure and Related Legislation: Hearings Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy,* 92d Cong., 1st Sess. 93 (1971); *Nuclear Power Plant Siting and Licensing: Hearings Before the Joint Committee on Atomic Energy,* 93d Cong., 2d Sess. 714 (1974).

A. The Commission Does Not Accept ACRS Letters as Evidence on Safety Issues.

Although Section 2.743(g) of the Commission's regulations provides that the ACRS report be offered in evidence by the Staff, the Commission has consistently held that, because ACRS members are not available for cross-examination, the reports are admitted for the limited purpose of showing compliance with the statute and are not admitted for the truth of any statements contained therein. 10 C.F.R. § 2.743(g) (1977); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units Nos. 3 and 4), 3 AEC 195 (ASLB 1967); *Wisconsin Electric Co.* (Point Beach Nuclear Plant, Unit 2), 5 AEC 319, 329 (ALAB 1972); *Arkansas Power and Light Co.* (Arkansas Nuclear One Unit 2) 6 AEC 25 (ALAB 1972); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Sta.), RAI-74-7 61 (ALAB 1974).

That the Commission only utilizes ACRS reports in an advisory fashion is also readily apparent from

those instances where the Commission has decided in a manner other than that suggested by the ACRS. In the instance of the application by the Power Reactor Development Corporation to build a reactor, studied by the Joint Committee in deciding to make the ACRS statutory but advisory only, the Commission determined to issue a construction permit despite questions raised in an ACRS report.[8] Recent decisions, involving the Vermont Yankee Nuclear Power Station, on whether a reactor's containment need be "inerted" illustrate that the Commission continues to decide in a manner contrary to recommendations of the ACRS when the Commission's judgment so dictates.[9]

Thus, the regulations and Commission opinions provide that all decisions on whether a license should issue are to be made by the Commission through its atomic safety and licensing board and the Commissioners; no decision is to be made by the ACRS. Rather, as clearly shown by the manner in which the ACRS report is used in the decisionmaking process, the report is advisory only.

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[8] *A Study of AEC Procedures,* JCP *supra. See* Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396 (1961). The fact that the Commission regulations allow the Licensing Board to rely on the conclusions of the ACRS "in addition to material admitted into evidence with respect to uncontested matters and in uncontested cases does not contradict this analysis. 10 C.F.R. Part 2, App. A, § V(f)(1) and (2) (1977). This is simply an explicit example of official notice. *See, e.g.,* 10 C.F.R. § 2.743(i) (1977).

[9] *See* the Commission's decisions in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Sta.) at RAI-74-11 809, 815 and at 826 (1974) in relation to the ALAB decision at RAI-74-761.

B. As the ACRS Report is an Advisory Report to the Commission, the Adequacy of its Contents is Not Subject to Review by the Courts.

Section 181 of the Act states that the provisions of the Administrative Procedure Act [hereinafter cited as APA], 5 U.S.C. §§ 501-03, 551-59 (1970 & Supp. V 1975), are applicable to all agency actions taken under the Act, with a proviso for actions and proceedings involving Restricted Data or defense information. 42 U.S.C. § 2231 (1970). Section 189b of the Act provides for judicial review of final orders in, *inter alia,* construction permit proceedings under the APA, 5 U.S.C. §§ 701-06 (1970) which provide judicial review for persons suffering legal wrong or adversely affected or aggrieved by agency action, and under 28 U.S.C. §§ 2341-50 (1970 & Supp. V 1975) which gives the courts of appeals exclusive jurisdiction to review all final orders. Section 189(a) of the Act 42 U.S.C. § 2239 (1970).

As the ACRS report does not constitute "agency action" nor is it embodied in a final order in construction permit proceedings, it is not subject to challenge by intervenors or review by the courts.

"Agency" is defined in Section 701 of the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency" with certain exclusions inapplicable here. Courts which have interpreted this language as it appears in various APA sections have concluded that to be an agency a body must have the authority to act with the sanction of the government behind it[10] or

[10] Lassiter v. Guy F. Atkinson Co., 176 F.2d 984 (9th Cir. 1949); Ellsworth Bottling Co. v. United States, 408 F. Supp. 280 (W.D. Okla. 1975).

have the authority in law to make decisions[11] or issue orders.[12] As the ACRS is advisory to the Commission with none of these authorities, it is itself not an agency and, therefore, its recommendations are not subject to the judicial review provisions of the APA. Furthermore, since the ACRS issues no final orders, it is not subject to judicial review under 28 U.S.C. §§ 2341-50. Therefore, it is evident that the ACRS reports are not subject to direct challenge. Nor are they subject to indirect challenge through attack on the Commission's orders.

The manner in which the Commission uses ACRS reports is clearly supported, if not mandated, by the Federal Advisory Committee Act, 5 U.S.C., App. I (Supp. V 1975). Section 2(b)(6) declares the intent of Congress that:

> the function of advisory committees should be advisory only, and that all matters under [consideration by executive officers and agencies] should be determined, in accordance with law, by the official, agency or officer involved.

This restricted role is emphasized by Section 9(b) which states:

> Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of actions to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or

[11] Washington Research Project, Inc. v. HEW, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied,* 421 U.S. 963 (1975).

[12] International Paper Co. v. FPC, 438 F.2d 1349, 1359 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971).

makes recommendations shall be made by the President or an officer of the Federal Government.

C. In any Event, the ACRS Report Adequately Describes "Other Concerns".

The court of appeals was in error in ordering the ACRS report to be returned "for clarification" because "a concerned citizen" would not be able to determine to what "other problems" the concluding paragraphs of the ACRS report referred. Pet App. 108.

The ACRS identified those "other problems" as "other problems related to large water reactors [which] have been identified by the Regulatory Staff and the ACRS and cited in previous reports." Pet. App. 105. In accordance with law all previous ACRS reports are public documents. 42 U.S.C. § 2232(b) (1970). For a "concerned citizen" to see to what problems the ACRS had referred in its other reports on large water reactors, he need only go to the Commission's public document room and read through the ACRS report file. Certainly, this would have been a less demanding task than formulating 337 interrogatories as did Saginaw. The reference to other ACRS reports is no different than a court citing to a prior unreported case. Each such citation directs a "concerned citizen" where to look for further discussion, reference, or explanation, but does not recapitulate the contents of the earlier decision. Yet, public interest in court processes and reasoning is surely no less than it is in ACRS reports.

IV. THE COMMISSION WAS CORRECT IN EXCLUDING CONSIDERATION OF THE FUEL CYCLE ISSUES FROM THE LICENSING OF THE MIDLAND NUCLEAR POWER PLANT.

These *amici* concur in the position of the Edison Electric Institute, *et al., amici curiae* in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., et al.,* U.S. Docket No. 76-419.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed and the matter remanded to the court of appeals for entry of judgment denying the petition for review.

Respectfully submitted,

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